United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7357,9

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 75-7357 and 75-7359

THE HOME INSURANCE COMPANY,

Plaintiff-Appellee,

—against—

THE AETNA CASUALTY AND SURETY COMPANY, and DIAMOND SHAMROCK CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE, THE HOME INSURANCE COMPANY

UNITED STATES COURT OF APPEALS
FILED
SEP 29 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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Judgment Appealed From

The Judgment appealed from was signed by Hon. Robert L. Carter, U.S.D.J., on May 9, 1975 and entered on May 13, 1975 (135-136a).* Judge Carter's opinion (120-134a) is reported in Ins. L. Rep. (Fire & Cas.) at 75-792.

Statement of Issue on Appeal

Was the District Court correct in holding that Diamond's "products liability for property damage" arose out of four lots of its "goods or products" within the meaning of the Aetna policy's "batch clause".

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* References are to pages in the Appendix.

Appellee's Statement of Relevant Facts

The facts are much simpler than would appear from Diamond's statement. Diamond made two lots (C 498 and C 500) of superconcentrated Vitamin D2 resin at its Harrison, New Jersey plant (48a). These lots were defective because of production mistakes at the Harrison plant (Br. p. 10).* Diamond shipped these two lots to its Louisville, Kentucky, plant where they were sprayed onto corn cob fractions to make four lots (7356, 7436, 7466 and 7589) of Nopdex "200" (48a). These four lots of Nopdex "200" were defective because the two lots of resin used in preparing them were defective (26a). Diamond sold these four lots of Nopdex "200" to Central Soya, which used them to make chicken feed, which was defective for the same reason (48-49a). Numerous chicken farmers, who bought the feed and fed it to chickens, suffered property damage (22a, 25a). All parties admit Diamond's liability. Their dispute is as to the limits of liability of Home under an excess policy it issued to Diamond (26a; Br. p. 4).

The Home excess policy indemnified Diamond for property damage liability in excess of $250,000 for each "occurrence", subject to the provisions as to the meaning and application of the term "occurrence" appearing in an underlying policy issued to Diamond by Aetna (110-119a) also covering Diamond's liability. Aetna's property damage limits were $250,000 for each "occurrence".** However,

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* Parenthetical page references to "Br." are to Appellant Diamond's brief.

** These limits are generally described under "Comprehensive General Liability Insurance" (115-116a), "III. Limits of Liability . . . Property Damage Liability Coverage" (116a), which limits Aetna's liability resulting from "any one occurrence" to "the limit of property damage liability stated in the Declarations as applicable to 'each occurrence.'" The Declarations (111a) state the property damage limits of liability for each occurrence as $250,000.

these limits were amended, as to the liability in question, by Endorsement No. 33 (117a), hereinafter referred to as the "batch clause", which provided:

> "LIMITS OF LIABILITY
>
> CGL PART—AMENDED
>
> IT IS AGREED THAT ITEM III LIMITS OF LIABILITY UNDER THE CGL PART AMENDED TO INCLUDE THE FOLLOWING AS RESPECTS PRODUCTS LIABILITY FOR BODILY INJURY AND PROPERTY DAMAGE COVERAGE:
>
> ALL SUCH DAMAGE ARISING OUT OF ONE LOT OF GOODS OR PRODUCTS PREPARED OR ACQUIRED BY THE NAMED INSURED OR BY ANOTHER TRADING UNDER HIS NAME SHALL BE CONSIDERED AS ARISING OUT OF ONE OCCURRENCE."

Argument

Despite appellants' misplaced emphasis on the Aetna policy's definition of "occurrence",* the only real issue on this appeal is whether, within the meaning of the batch clause, Diamond's "products liability for . . . property damage" arose out of four lots of "goods or products" as the Court below held, or two lots of "goods or products" as appellants contend.

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* Appellant's first and principal argument here, as below, is that were it not for the batch clause there would be only two "occurrences". Because the batch clause obviously moots that argument, we deal with it later (pp. 15-20), as briefly as possible.

I.

The Court Below Correctly Held That the Batch Clause Required the Application of Four $250,000 "Each Occurrence" Limitations.

A. *The District Court's Construction of the Batch Clause Is the Only Reasonable One.*

Insurance policies are construed in accordance with the reasonable expectations of an average insured. *Morgan* v. *Greater N.Y. Taxpayers Mut. Ins. Ass'n*, 305 N.Y. 243 (1953); *McGrail* v. *Equitable Life Assur. Soc. of U.S.*, 292 N.Y. 419 (1944). Substantial weight must be given to the nature of the risk insured [*Thomas J. Lipton, Inc.* v. *Liberty Mutual Ins. Co.*, 34 N.Y. 2d 356 (1974)] and to the context in which the words to be construed appear [*Eighth Ave. Coach Corp.* v. *City of New York*, 286 N.Y. 84 (1941)].

By its terms, the batch clause applies only "as respects products liability". The meaning and limitations of "products liability" can be found in the Aetna policy's definition of "products hazard" (112a):

> "'products hazard' includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;"

and in several relevant exclusions,* each prefaced by the phrase "this insurance does not apply":

> "to property damage to . . . property owned . . . by . . . the insured" [exclusion (k)(1), 115a]
>
> "to property damage to . . . property used by the insured" [exclusion (k)(2), 115a]
>
> "to property damage to . . . property in the care, custody or control of the insured" [exclusion (k)(3), 115a]
>
> "to loss of use of tangible property which has not been physically injured or destroyed resulting from . . . the failure of the named insured's products . . . to meet the level of performance, quality, fitness or durability warranted or represented by the named insured; but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products . . . after such products . . . have been put to use by any person or organization other than an insured" [exclusion (m), 115a]
>
> "to property damage to the named insured's products arising out of said products or any part of said products" [exclusion (n), 115a].

It is clear from these definitions and exclusions that "products liability for . . . property damage", the term used in the batch clause, means liability of Diamond for damage to a third person's property as a result of the use by such third person of a commodity made and/or distributed by Diamond after that commodity has passed out of Diamond's possession. It is in this context that the District Court

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* The Aetna policy covers "products liability" as part of its broad "Comprehensive General Liability" coverage of all legal liability for bodily injury or property damage except that specifically excluded (115-116a).

held that, in the phrase "as respects products liability for . . . property damage . . . all such damage arising out of one lot of goods or products", the words "one lot of goods or products" had to refer to each of the four Louisville lots of Nopdex "200" Diamond sold to Central Soya, not to the two Harrison lots of resin it used in making the four lots of Nopdex "200" (131a):

> "I agree with Home that a 'common sense' construction clearly supports the conclusion that the term 'goods or products' refers to the goods which Diamond Shamrock sells to third persons, and which, if defective, give rise to liability. Accordingly, I find that Home is entitled to summary judgment declaring that the 'lots' referred to in Endorsement #33 were the *four* Louisville lots of Nopdex and that the damage in this case arose out of *four* occurrences.
>
> "If the parties had intended Endorsement #33 to refer to accidents arising from ingredients as defendants argue, they would surely have used more apt terms such as 'intermediate products' or 'ingredients.'"

The damage involved in this case was property damage to chicken farmers. It hardly arose out of the two Harrison lots, for had Diamond detected the defective condition of those lots no "damage" would have arisen at all. The "damage" arose only because Diamond sold and delivered the four Louisville lots of Nopdex "200" and therefore must be held to "arise" from those four lots. As the Court of Appeals for the Fifth Circuit observed in *Maurice Pincoffs Co.* v. *St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204, 206 (5th Cir. 1971), a case involving the limits of insurance coverage (in the absence of a batch clause) of liability resulting from Pincoff's distribution of contaminated bird seed:

> "[I]t was not the act of contamination which subjected Pincoffs to liability. If Pincoffs had destroyed the seed before sale, for instance, there would be no occurrence at all for which the insured would be liable. But once a sale was made there would be liability for any resulting damages."

Diamond has launched a wide variety of attacks on the District Court's conclusion. None of them can withstand analysis.

First, Diamond refers to the policy's definition of "named insured's products" as "goods or products manufactured, sold, handled or distributed by the named insured . . ." (Br. p. 22). But this definition merely uses the words "goods or products", it does not define them. While it tells us that "goods or products" that are "manufactured" or "handled" fall within the definition of "named insured's products", it does not tell us that commodities used internally to make commodities that are sold are themselves "goods or products" as those words are used in the batch clause. Compare the definition of "products hazard" (112a, quoted *supra,* at p. 4) which is expressly limited to "bodily injury or property damage arising out of the named insured's products . . . after physical possession of such products has been relinquished to others."

Diamond's attack continues with a series of dictionary definitions that prove nothing. First, they demonstrate that the words "goods" and "products", if read *in vacuo,* could be said to apply either to the two lots of Harrison resin or the four lots of Louisville Nopdex "200" (Br. p. 22). This hardly suggests the proper choice between them in the context of the batch clause and is accompanied by tasteless and unnecessary sarcasm directed at the District Court (Br. p. 23, fn.).

Next Diamond offers a definition of the word "arise" and concludes that the damage "arose" out of the two Harrison lots (Br. p. 25). The same argument also compels the conclusion that the damage "arose" out of the four Louisville lots. Again, resort to an out of context dictionary definition at best avoids and at worst obscures the issue.

This is also true of the definitions of "prepare" and "prepared" upon which Diamond dwells at length (Br. pp. 26-27). Certainly, the two Harrison lots were "prepared" by Diamond, but so were the four Louisville lots. This fourth trip to the dictionary, like the previous ones, misses the question: Which group of lots are "lot(s) of goods or products" in the context of the batch clause?

Finally, Diamond argues that the word "acquired" in the phrase "one lot of goods or products prepared or acquired by the named insured" compels the conclusion that the word "prepared" must refer to the two Harrison lots (Br. p. 27). This argument rests on Diamond's erroneous application of the batch clause to a hypothetical case in which Diamond acquired two defective lots of Vitamin D3 resin from a third party, processed those two lots into four lots of Nopdex "200" and sold them to Central Soya, with resulting property damage to chicken farmers. Diamond concludes that such damage "arose" from the two lots of resin it "acquired". The trouble with this conclusion is that, using Diamond's non-contextual and ultra-literal approach, the damage also "arose" from the four lots of Nopdex "200" it "prepared", so that, as in the instant case, the application of the batch clause requires the Court to decide not what "arising" means, not what "prepared" means, and not what "acquired" means, but whether "products liability for property damage . . . arising out of one lot of goods or products" refers to one lot of a commodity

Diamond sold, thereby exposing itself to "products liability" or one lot of resin used by Diamond as an intermediate in making the commodity it sold. We submit that the District Court's answer to this question is the only reasonable answer.

The batch clause must be construed so that it is capable of consistent application. *Eighth Ave. Coach Corp.* v. *City of New York,* 286 N.Y. 84 (1941); *Atwater & Co.* v. *Panama R. R. Co.,* 246 N.Y. 519 (1927). The District Court's construction is the only one that permits consistent application, for it is only under that construction that there can never be a dispute as to the applicable number of lots so long as the facts are known.* One hypothetical proves this point. Assume that the four Louisville lots of Nopdex "200" were defective because of (a) defects in the two Harrison lots of resin and (b) defects in the one lot of corn cob fractions upon which the resin was sprayed. Unless, under the batch clause, the relevant lots were of the Nopdex "200" sold by Diamond, there would be no rational way to determine the applicable policy limits.

B. *Appellants' Reliance Upon Secondary Aids to Construction Is Misplaced.*

In the District Court, appellants cross-moved for summary judgment, contending that the batch clause was unambiguous. In this Court, they rely much more heavily on such secondary aids as the rule of *contra proferentum* and extrinsic evidence of custom and usage and intent. The short answer is that the "batch clause" is unambiguous and

* It is possible that Diamond might sell defective products which could not be traced to specific lots and that the reason for or source of the defect could not be attributed to any lot of raw material, intermediate, or commodity sold. Such problems could exist however the batch clause is construed and therefore have no bearing on this analysis.

therefore, under the applicable law, *contra proferentum* is inapplicable [*Union Ins. Soc. of Canton, Ltd.* v. *William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965)] and the Court may consider neither extrinsic evidence of custom and usage [*Matter of Western Union Telegraph Co.*, 299 N.Y. 177 (1949); *Frankel* v. *Tremont Norman Motors Corp.*, 21 Misc. 2d 20 (Sup. Ct., Bronx Co. 1959), *aff'd*, 10 App. Div. 2d 680 (1st Dept. 1960), *aff'd*, 8 N.Y. 2d 901 (1960)] nor extrinsic evidence of intent [*Laba* v. *Carey*, 29 N.Y. 2d 302 (1971); *Frankel* v. *Tremont Norman Motors Corp., supra*)]. However, even if this Court considers the batch clause ambiguous, the judgment below should be affirmed.

1. The Rule of *Contra Proferentum* Must Be Applied Against Appellants.

If the rule of *contra proferentum* is applicable to this case, it requires that ambiguities be construed against appellants. The unspoken major premise of Diamond's argument to the contrary is that the rule reflects a judicial bias against insurance companies. The real basis of the rule was stated by the Supreme Court in *Calderon* v. *Atlas Steamship Co.*, 170 U.S. 272, 280 (1898):

> "A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

Usually the "expressions" in a contract of insurance are those of the insurer. It is for this reason that the rule is usually applied against it. *London Assurance Corp.* v. *Thompson*, 170 N.Y. 94 (1902); *accord, Union Ins. Soc. of Canton, Ltd.* v. *William Gluckin & Co.*, 353 F.2d 946, 951

(2d Cir. 1965). Here, however, the "expressions" to be construed appear in a contract between Diamond and Aetna to which Home was not a party. The words in the batch clause were the "expressions" of Diamond and Aetna. If those words are ambiguous, they must be construed against them. *London Assurance Corp.* v. *Thompson, supra* at 102.

This approach is fully consistent with and indeed is supported by *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974). This Court there applied *contra proferentum* against the all risk insurers because of an ambiguity in policies written by those insurers and issued to Pan Am, despite the fact that application of the rule benefited the war risk insurers. This Court's reliance in *Pan American* (505 F.2d at 1002) on *London Assurance Corp* v. *Thompson, supra,* is particularly significant here. In *Thompson, supra at* 102-03, the New York Court of Appeals resolved an ambiguity in a policy of insurance in favor of the defendant-insurer because the ambiguity in its policy was in language prepared by the plaintiff-insured*:

> "As the terms of insurance, including the description of the risk, were wholly prepared by the plaintiff, an insurer of wide experience, for it has done business since 1720, and the defendant had no information upon the subject, except the typewritten slip furnished by the plaintiff, we think that the responsibility for the ambiguity should be borne by the party who caused it. [Citations omitted.] While the defendant adopted the plaintiff's words when he pasted the slip in the policy, he could not do otherwise if he made any contract

* The policy was one of reinsurance issued by the defendant to the plaintiff, which was also an insurance company. The Court of Appeals regarded the plaintiff as the insured and the defendant as the insurer.

whatever. They were still the words of the plaintiff, the doubt caused thereby was caused by the plaintiff, and the defendant should not be required to father its offspring. The principle of resolving doubts in a unilateral contract by throwing the burden upon the one who caused them, applies with the same force to this case, under its peculiar circumstances, as to the cases cited and, as we think, furnishes the proper solution of the controversy."

The *Thompson* case compels the resolution of ambiguities in the "batch clause" in favor of Home and against Aetna, one of the authors of the "batch clause" and "an insurer of wide experience." The same must be true as to Diamond, which admittedly procured the inclusion of the batch clause in the Aetna policy and was represented in doing so by well-known and knowledgeable insurance brokers (34-39a). A contrary conclusion could be based only upon the facts that Home is an insurance company and Diamond is not and thus would offend commonly accepted and perhaps constitutional principals of equal justice.*

2. Appellants' Affidavits Purporting to Show Custom and Intent Do Not Raise a Triable Issue of Fact.

Appellants offered the affidavits of Otto Kaufmann, Jr. (50a), an Aetna employee, and William R. Greening (34a)

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* The recent District Court decision in *Champion International Corp.* v. *Continental Cas. Co.*, Ins. L. Rep. (Fire & Cas.) 75-823 (S.D.N.Y. May 1, 1975), discussed at p. 34 of appellants' brief, may be distinguishable. It is unclear from the opinion whether, in applying the rule of *contra proferentum* against the excess insurer, the District Court was interpreting the underlying policy, the excess policy, or both; and the District Court described both policies as "standard ones." To the extent *Champion's* holding differs from our analysis above, we believe it to be erroneously decided. We understand that Continental intends to appeal after the trial on damages.

and Michael Collins (37a), both officers of Alexander & Alexander, Diamond's insurance brokers, to prove that custom and usage and the intent of the parties to the Aetna-Diamond insurance contract required a "two lot" construction of the batch clause. The District Court held that these affidavits were conclusory, that the "custom and usage" affidavits failed to show the affiants' qualifications to testify as to industry custom and usage, and that the intent affidavits failed to show any expression of mutual intent. Since these averments, if made from the witness stand, could not have survived objection, the District Court refused to consider them (132-134a).

Custom and Usage. Collins' affidavit stated that he had been casualty claims manager at Alexander & Alexander for three years, and for eight years before that a claims adjuster, examiner and supervisor at INA, during which time he participated in interpreting batch clauses (37-38a). With no more evidence of his qualifications and with no specifics at all, Mr. Collins then offered his opinion as to industry custom and usage (38-39a). He did not refer to a single instance in which a batch clause had been interpreted in accordance with his opinion. He did not name a single insurance company, broker or insured that ever interpreted a batch clause in that manner, not even INA or Alexander & Alexander. Nor did he refer to a single writing consistent with his opinion. This Court has rejected better and more specific evidence than Mr. Collins offered as failing to prove a custom. *Encyclopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer,* 422 F.2d 7, 18 (2d Cir. 1969).

Intent. Mr. Greening said it was Alexander & Alexander's "purpose" in insisting that the batch clause be included in the Aetna policy to make it clear that "there would be one occurrence for each batch or lot to which an

accident occurred" (35-36a). Mr. Kaufmann agreed that this was "the purpose and intent" but he did not say whose "purpose and intent" (51a). Neither affiant specified a single statement, writing or act communicating this supposed intent between Aetna and Diamond or its broker, much less from any of them to Home. These conclusory statements are classic examples of the type of averments that are universally ignored on motions for summary judgment, even when the witnesses negotiated the contract in suit. F.R.C.P. 56(e); *Union Ins. Soc. of Canton, Ltd.* v. *William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965); *Atlas Assur. Co.* v. *Standard Brick & Tile Corp.*, 264 F.2d 440 (7th Cir. 1959). *A fortiori* they can have no bearing on the scope of the obligation of Home, which was not a party to the Aetna-Diamond policy or to the negotiations that preceded it (62a). See *London Assurance Corp.* v. *Thompson*, discussed *supra* at pp. 10-12. Diamond's argument that Home should have suspected Diamond's present interpretation of the batch clause because of the presence of a deductible in the Aetna policy (Br. pp. 30-31) is so absurd as to require no rebuttal, although its flagrant variance from the facts requires the comment below.*

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* The affidavit of Home's Arthur J. Mella states that Home did not know of the deductible when it issued its excess policy (62a) and annexes as an exhibit all the information as to the underlying policy it had at that time (86-109a). This affidavit, sworn to November 20, 1974, was served and filed the next day as part of Home's reply papers (2-3a). Appellants requested and were granted leave to file further briefs (3a) but did not seek to file further affidavits. Thus Mr. Mella's averment not only is incontroverted, but appears incontrovertible. Mr. Burns' mention of the deductible in Home's moving affidavit (13a) obviously is based upon information acquired in the course of investigation subsequent to Home's receipt of notice of the events underlying this action. The regrettable statement in Diamond's Brief (p. 30) that the Burns affidavit "indicates that Home knew of the . . . deductible" when it issued its excess policy should be ignored.

3. The Judgment Below Should Be Affirmed Even If the Batch Clause Is Considered Ambiguous.

Citing *Mallad Constr. Corp.* v. *County Federal Savings and Loan Ass'n,* 32 N.Y.2d 285 (1973), the District Court held that appellants' conclusory affidavits do not bar summary judgment. *Mallad* holds that even where a motion for summary judgment requires construction of an ambiguous writing, no triable issue of fact is presented unless raised by conflicting evidentiary extrinsic facts presented to the Court. Appellants' have presented no such facts. Thus, assuming the District Court regarded both the "four lot" and "two lot" interpretations of the batch clause as reasonable, it was required to choose the better interpretation, as it did, and to grant summary judgment accordingly.

II.

If the Aetna Policy Did Not Contain a Batch Clause, There Would Be Numerous "Occurrences".

Diamond's liability was "product liability." Therefore, the sole determinant of the number of "each occurrence" limits of liability applicable to the coverage of the Aetna policy is the batch clause. That clause does not look to the policy definition of "occurrence." Nor is its operation restricted to reducing Aetna's liability. In an appropriate case, it could increase it.*

Therefore, we are mystified, as we were below, by Diamond's elaborate argument that if there were no batch

* For example, if Diamond made four lots of a supposedly inert but actually explosive chemical and sold them to a single customer who stored the chemical in one warehouse which was destroyed in the ensuing explosion, the batch clause would require the application of four limits of liability even though there had been but one "accident" or "occurrence."

clause in the Aetna Policy, there would be but two "occurrences." The District Judge also seemed puzzled by its presence. While he discussed it at some length (126a, *et seq.*). he rejected it (130a) and then based his decision on the batch clause (131a). Since the argument comprises the major part of Diamond's brief, prudence dictates that we meet it.

A. *The District Court Correctly Construed the Word "Occurrence"*

The pertinent words of definition are (112a):

> "Occurrence means an accident . . . which results in . . . property damage." *

Diamond argues that "accident" means the originating cause of the property damage (the production mistakes at Harrison). Home contends that "accident" means the direct cause of the property damage (use by farmers of the defective chicken feed).

The District Court held that the latter meaning was the only reasonable one, relying primarily on *Arthur A. Johnson Corp.* v. *Indemnity Ins. Co.*, 7 N.Y.2d 222 (1959). In *Johnson*, the Court of Appeals held that the collapses of two retaining walls, 50 minutes apart, constituted two "accidents" despite the fact that an unprecedented rainfall contributed to each collapse. *Johnson* directly supports the District Court's decision because the express rationale of the Court of Appeals was that the two collapses (not the rainfall, and not the inadequacy of each wall) were "accidents" within the meaning of the policy. 7 N.Y.2d at 230.

The District Court's conclusion is supported also by consistent precedent. Where an error or omission has

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* Diamond concedes that "property damage" means damage to the property of the chicken farmers (Br. p. 25).

resulted, after a period of time, in one or more events that in turn result directly in bodily injury or property damage, American courts, without any exception disclosed by our research or cited by appellants, have held that the "accident" or "occurrence" within the meaning of a liability policy is the event that directly causes the injury or damage, not the remote act or omission that starts the chain of causation. *Kansas City Insulation Co.* v. *America Mut. Liability Ins. Co.*, 405 F.2d 53 (8th Cir. 1968) ("Accident" was rupture of water main, not improper installation of valve that caused rupture.); *Bitts* v. *General Accident Fire and Life Assur. Corp.*, 282 F.2d 542 (9th Cir. 1960) ("Accident" was explosive escape of gas from refrigerator compressor, not seller's failure to warn of this danger.); *George W. Deer & Son* v. *Employers Indemnity Corp.*, 77 F.2d 175 (7th Cir. 1935) ("Accident" was explosion of product sold as kerosene, not seller's mistake in adding volatile material to the kerosene prior to delivery.); *Bituminous Cas. Corp.* v. *Horn Lumber Co.*, 283 F.Supp. 365 (W.D. Ark. 1968) ("Accident" was fall of lumber during unloading of truck, not mistake in loading truck improperly.); *Nielson* v. *Travelers Indemnity Co.*, 174 F.Supp. 648 (N.D. Iowa 1959), *aff'd*, 277 F.2d 455 (8th Cir. 1960) ("Occurrence" was explosion of gas main, not earlier damage to gas main that caused the explosion.); *Remmer* v. *Glenns Falls Indemnity Co.*, 140 Cal. App. 2d 84, 295 P.2d 19 (1956) ("Occurrence" was rock slide, not earlier grading of property that caused rock slide.); 55 A.L.R.2d 1288, 1304 ("If . . . the times or places and detailed causes of each instance of injury or damage are different, there are separate accidents although each contains a common causal factor."); 57 A.L.R.2d 1379, 1389 ("It appears to be well settled that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when

the complaining party was actually damaged."). See *Maurice Pincoffs Co.* v. *St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971).*

In support of the contrary position, Diamond cites but two cases. One is an Oregon case that actually supports the District Court's conclusion.** The other is a Canadian case with an obscure holding.***

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* In Pincoffs plaintiff-insured bought contaminated birdseed and sold it to eight dealers who resold it to bird owners, with disastrous results. St. Paul, Pincoffs' underlying insurer, had issued a policy with limits of $50,000 per occurrence and $100,000 aggregate and argued that there was but one occurrence, the contamination of the seed. The Court rejected this argument as the District Court did here, but reasoned that there were eight "occurrences," one for each sale by Pincoffs. No party had reason to argue that there were more "occurrences" for two would have been sufficient to exhaust the aggregate limits of St. Paul's policy. While the batch clause makes the point academic here, we submit that the Fifth Circuit overlooked the above authority in selecting sales by Pincoffs, as opposed to feeding of the seed to birds, as the determinant of the number of "occurrences."

** *Ramco, Inc.* v. *Pacific Ins. Co.*, 249 Or. 666, 439 P.2d 1002 (1968) (Br. p. 15, 20). Ramco had made and sold to a motel owner electric heaters with defective coils. The heaters failed to work properly and the motel owner sued Ramco, which settled the suit and then sued Pacific under its liability policy. The Oregon Supreme Court discussed only the question whether Ramco's liability resulted from an "accident" as that word was used in the policy. It did not deal with the question whether the "accident" was defective manufacture of the heaters or their resultant failure to work after installation. Since the Court found for Ramco, it implicitly held that the "accident" was the failure of the heaters to function as intended, for the policy covered products liability (439 P.2d at 1003) only if it was "caused by accident" and only "if the accident occurs after possession of . . . goods and products has been relinquished to others by the named insured . . . and if such accident occurs away from premises . . . [of] . . . the named insured" (*id.* fn. 1).

*** *Andrews & George Co. Ltd.* v. *Canadian Indemnity Co.*, 1 D.L.R. 180 (Brit. Col. Ct. App. 1951), *rev'd* on other grounds, 4 D.L.R. 690 (Can. Sup. Ct. 1952). The precedential value of this case is questionable since, as Diamond concedes (Br. p. 15,

Perhaps the basic flaw in Diamond's interpretation of "occurrence" is that it makes the batch clause "useless or inexplicable." 4 Williston on Contracts, § 619. The Aetna policy already provides, under the heading "Property Damage Liability Coverage" (116a):

> "The total liability of the company for all . . . property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to 'each occurrence.'"

If, as Diamond argues, a defective lot constitutes one accident* and where there is one accident there can be but one occurrence, then Aetna's liability, even without the batch clause, can never exceed $250,000 per lot and the batch clause says exactly the same thing as the portion of the Aetna policy it purports to amend.

B. *Appellants' Reliance on Secondary Aids in Construing the Word "Occurrence" Is Misplaced.*

The Court should not consider secondary aids to construction because the words "occurrence" and "accident" as used in the Aetna policy have only one reasonable meaning.** See pp. 9-10, *supra*. *Contra proferentum*, if

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fn. 1), two of the five Justices of the Supreme Court dissented from the Court of Appeals' conclusion on "accident" and one expressed no opinion on that issue.

* Perhaps Diamond will explain in its reply brief how a defective batch can be considered an "accident." The precise meaning of the word "accident" may be debatable, but it clearly is an event, not a thing. Were it Diamond's contention that the "accidents" in this case were mistakes made at Harrison rather than defective batches that resulted from those mistakes, it would be guilty of bad reasoning, but not bad grammar as well.

** In the *Kansas City Insulation Co.*, *Bitts*, *Horn Lumber* and *Remmer* cases, *supra*, p. 17, the Courts' constructions of "ac-

it applies at all, applies here against Aetna and Diamond. See pp. 10-12, *supra.*

The District Court rejected the Greening (34a) and Kaufmann (50a) affidavits as to the meaning of "occurrence" supposedly intended by Aetna and Diamond. Those affidavits said that the National Bureau of Casualty Underwriters dropped the batch clause when they added a new definition of occurrence because, according to Greening "it was generally understood" (35a) and according to Kaufmann "[T]he National Bureau . . . felt" (51a) "that the new definition of occurrence had the same effect as the 'batch' clause" (35a; 51a). Neither affidavit names the people who supposedly "understood" this, explains how the affiant knows what "was generally understood" or what the National Bureau "felt" or offers any of the many reports generated by the National Bureau as to its reasoning.* For the reasons stated at pp. 12-14, *supra,* the District Court correctly disregarded those averments (133-134a).

III.

If This Court Reverses the Judgment in Home's Favor, It Should Affirm the Order Denying Appellants' Motions for Summary Judgment.

Home moved for summary judgment in the District Court on one affidavit, that of Robert H. Burns (12-18a)

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cident" and "occurrence" led to decisions in favor of the insurers that had authored those words for the words appeared in exclusions. Had those Courts considered the words ambiguous, *contra preferentum* would have required decisions against the insurers.

* Affiants' omissions are understandable for these reports show that the Bureau's reasoning was diametrically opposed to appellants' argument (58-60a, 63a, 69a, 76a). This must be particularly embarrassing to Mr. Kaufmann of Aetna for one of the officers of his company authored a memorandum expressing and explaining the Bureau's reasoning (58a, 69a).

which did no more than describe events relating to Diamond's liability that Home believed to be undisputed. Appellants countered with affidavits purporting to contain extrinsic evidence of intent and custom and usage (34a, 38a, 50a). As a precaution, Home submitted the affidavit of Arthur J. Mella (55a), sharply controverting appellants' affidavits.

Should this Court reverse the judgment below because of appellants' affidavits, we submit that it should affirm or leave undisturbed so much of the interlocutory order below as denied appellants' cross-motions for summary judgment. For one thing, the Mella affidavit raises issues as to the "facts" stated in those affidavits. Moreover, appellee should have the right to depose or cross-examine appellants' affiants concerning events to which it was not a party and therefore lacked knowledge. F.R.C.P. 56(f).

CONCLUSION

The judgment and order below should be affirmed.

Respectfully submitted,

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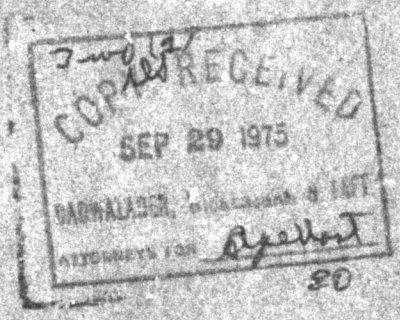

2 copies Received
Sept. 29, 1975
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MEILEN PRESS INC. — N. Y. C. 219